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Disputes about the Legitimacy of the “New” Democratic Constitution in Postwar Japan

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I The Never-ending Attack on “The Constitution of Japan”

The Constitution of Japan, which is valid in Japan today, was promulgated in 1946 and replaced the Meiji Constitution. The former Constitution declared that the ruling power in Japan was inherently possessed by the Tenno (Emperor). The separation of powers and bill of rights were included in the Constitution, but the Diet (Japanese parliament) had only limited competence and in the end, the military forces gained despotic power by abusing the authority of the Tenno.

After Japan’s defeat in the Second World War, the Constitution was totally changed. The new Constitution declared the principles of popular sovereignty, the guarantee of fundamental human rights, and pacifism. The Tenno lost all political competence and the government system was totally democratized. Japanese courts gained the full competency of judicial review to nullify unconstitutional laws. This Constitution has never been amended until now. It is well established in Japanese society.

However, there are also some contradictory phenomena concerning the Japanese Constitution. The most famous case stemmed from Article 9 of the Constitution which declares that Japan shall renounce war as a means of settling international disputes and that in order to accomplish this aim, “war potential” will never be maintained. Japan has nevertheless had Self Defense Forces (SDF) since 1954. The SDF have grown to one of the biggest military forces in the world, but Article 9 remains unchanged. The SDF have been legitimized by the logic that Article 9 does not forbid the possession of forces for the purpose of self-defense.

Many politicians of the conservative Liberal Democratic Party (LDP), which has been the primary ruling party, have demanded that Article 9 be amended to clearly recognize the legality of the SDF. However, their directive has not yet been realized. The responsible politicians in the government have not dared to make a proposal to amend the Constitution. Even today’s Cabinet, led by the very conservative Prime Minister Shinzo

Abe, has not done so. It wanted to enlarge the role of the SDF and has realized its goal not by amending the text but by changing the interpretation of the Article. Abe has recently made public his wish to add a new paragraph to Article 9 to guarantee the constitutionality of the SDF, but it is by no means certain if he will succeed.

To amend an Article in the Japanese Constitution, two-thirds of the members of each House of the Diet must concur with the proposal. The amendment is then submitted to the people and would be ratified if a majority of all votes affirm it (Art.96 (1)). The LDP has not tried to amend Article 9, perhaps because it is afraid to lose a national referendum. They know that Article 9 has been firmly established in the minds of the Japanese people. As a result, Japan simultaneously has Article 9, the pacifism clause, and the SDF, which were recently sent to Africa to conduct peacekeeping operations.

There is an even deeper contradiction concerning the Japanese Constitution. The LDP, which has been the ruling power for a long time under the Constitution of Japan, has not fully recognized the legitimacy of the Constitution itself. This party was founded in 1955 and since then has persisted in its original mandate to enact a “self-made Constitution.” It aims in essence not to amend Articles in the Japanese Constitution, but to replace it totally. It even published a draft of the “New Constitution” in 2005.

The deep antagonism of Japanese conservatives toward the Japanese Constitution has its roots in the fact that it was enacted during the occupation by the Allied Powers (in fact by the USA alone) after the Second World War. It has been seen as an “enforced Constitution.” The three principles of the Constitution mentioned above have been also attacked as “enforced” principles, which originated in western countries and are not suited to Japan. The wish of the conservatives to replace the Constitution totally has no chance of being realized. Nevertheless, or just therefore, they adhere to the deficit of the legitimacy of the Constitution of Japan.

The title of this paper describes the Constitution of Japan as “new.” This Constitution is now 70 years old and has never been amended. It perhaps should be called an “old Constitution.” However, it is in some sense eternally “new.” It brought modern constitutional principles to Japan for the first time. This meant a revolutionary change to Japanese politics, but this change was led by the Allied Powers. There is a fundamental

contradiction inherent in the Constitution of Japan in that the Constitution which brought democracy to Japan was not born by the Japanese people. The conservatives do not recognize it as their own Constitution. It remains “new,” even though they have been required to act under the rules of the Constitution for such a long time.

II The Birth of the August Revolution Theory

Against this political background, most constitutional law scholars have defended the legitimacy of the Constitution of Japan. The most influential assertion for this purpose is the August Revolution theory first advocated by Toshiyoshi Miyazawa. Miyazawa was a University of Tokyo professor, one of the most important scholars of constitutional law at that time.

The Japanese government announced the draft of the new Constitution on March 6, 1946. It was originally published as amendments to the Meiji Constitution, but the government planned to replace the former Constitution completely and also, in substance, it already contained the three basic principles of the Constitution of Japan. It surprised the people especially because it denied the sovereignty of the Tenno. It said that the Tenno shall be the symbol of Japan, and his position derived from the sovereign will of the people. Before the government announced its definitive plan to amend the Meiji Constitution, various political groups expressed their thoughts, but most proposals contained only more moderate changes. Many of them strengthened the power of the Diet while keeping the fundamental principle of the sovereignty of the Tenno.

Although the Japanese people sensed then that the Allied Powers had somehow acted behind the scenes to make the Constitution so radically democratic, the fact that they had in fact written the original draft and then “recommended” to the Japanese government to accept it was reported only after the end of the occupation.

Shortly after the announcement of the draft of the new Constitution, Miyazawa published an article in which he defended it with the idea of the August Revolution theory.¹ He stressed that the Constitution’s most important feature was the adoption of popular

¹ Toshiyoshi Miyazawa, *Hachigatu-kakumei to Kokuminn-shuken-shugi* (August Revolution and the Principle of the Popular Sovereignty), *Sekai-bunka*, May 1946, at 64. *See* Shigenori Matsui, *The Constitution of Japan* 18-21(2011).

sovereignty, which meant the inevitable denial of the sovereignty of the Tenno. Under the Meiji Constitution, the power to rule Japan had come from the authority of the Tenno. According to the draft, it comes from the people. Even the position of the Tenno would be decided by the will of the people.

Miyazawa doubted if such a fundamental change of sovereign power could be realized by amending the Meiji Constitution. The power to amend the Constitution is itself authorized by the ultimate sovereign power. Therefore, he declared that changing the sovereign with an amendment clause was logically impossible. In Japan, the sovereignty of the Tenno could not be legally denied by using the amendment clause of the Meiji Constitution. Nevertheless, Miyazawa legitimized the government's plan to enact the new Constitution as amendments to the Meiji Constitution. He found that in August 1945, at the time of the acceptance of the Potsdam Declaration, which had recommended that Japan surrender, the sovereignty of the Tenno had been already abandoned, because in the declaration the Allied Powers had demanded that the future Japanese government should be established "in accordance with the freely expressed will of the Japanese people." Miyazawa interpreted this clause of the Potsdam Declaration as a request to adopt popular sovereignty. Japan had thus accepted a principle which was clearly contrary to the basic principle of the Meiji Constitution. This was a revolution in the legal sense.

Because popular sovereignty had already been accepted, according to Miyazawa, the government's proposal to change the fundamental principle of sovereignty was legally permissible. Exactly speaking, it only confirmed the accomplished revolution. This was the August Revolution theory.

This theory was first asserted to advocate for the draft of the Constitution, not the new Constitution itself. Miyazawa explained that the government did not dare to bring about a revolutionary change, which was legally forbidden at the time, because it had already occurred in August 1945.

III The Spread of the August Revolution Theory and its Weak Points

The government proposed the new Constitution to the Diet, and after deliberations there, the Constitution of Japan was approved and promulgated. However, during the debates in

the Diet, the government did not accept the August Revolution theory. It claimed that there were no limits to amendments of the Constitution and that according to the amendment clause of the Meiji Constitution, it could be replaced completely.²

After the new Constitution took effect, the August Revolution theory nevertheless became the commonly-held opinion as to the legal explanation of its birth. The decisive merit of this theory is that it clearly expressed the severance between the two Constitutions. This theory spread especially because of the famous debate between Miyazawa and Tomoo Otaka, his colleague at the University of Tokyo, known as the controversy on the sovereignty of “nomos.” Otaka saw in the August Revolution theory Miyazawa’s will to make the change of the principle of sovereignty clear. Otaka wondered, however, if the new Constitution, which was based on such an unfamiliar idea for the Japanese, would be maintained. He tried to explain that popular sovereignty and the new position of the Tenno as the national symbol did not mean a fundamental severance of Japanese political traditions.³

Otaka said that politics should always be led by the idea of justice. He called this claim the sovereignty of nomos. Holders of sovereign power should not exercise it as they wish, but they are responsible for following this idea. Who has the sovereign power is then not the most important problem in politics. In Japanese history, the sovereignty of the Tenno had surely not meant that he had had absolute power, but that the idea of justice had been connected with him. The new Constitution demanded that the people themselves should have the responsibility for realizing the correct policies. Nevertheless, the sovereignty of nomos itself remained unchanged. Otaka suggested that the Tenno could play a meaningful role even under the new Constitution as a symbol of the “general will” of the people (not the will of the simple majority).

Miyazawa criticized Otaka in that his theory glossed over the severance of the principle of sovereignty.⁴ The sovereignty of nomos did not answer the problem of who had sovereign power. Although we can agree that politics should follow justice, the

² See Nobuyoshi Ashibe, *Kenpo-gaku I (Constitutional Theory I)* 194f. (1992).

³ Tomoo Otaka, *Kokumin-shuken to Tenno-sei (Popular Sovereignty and the Institution of Tenno)* (1947).

⁴ Toshiyoshi Miyazawa, *Kenpo no Genri (Principles of Constitutional Law)* 281ff. (1967, first published in 1948).

problem of who definitively decides its content does not disappear. Here, the new principle of popular sovereignty was uncompromisingly opposed to the sovereignty of the Tenno. Miyazawa demanded that the Japanese should clearly recognize that the Japanese traditional principle of the sovereignty of the Tenno had already been denied. He also disagreed that the Tenno symbolized popular sovereignty. There was no reasonable basis to still see the Tenno as the necessary symbol for the correct policies.

Many constitutional scholars supported Miyazawa's position which declared that the Constitution of Japan stood on the absolutely new principle of sovereignty. It was not just amendments of the old Constitution, but a totally new Constitution following the August Revolution. This theory seemed to be appropriate to establish democracy in postwar Japan. However, to select this theory to explain the legitimacy of the new Constitution meant at the same time that the constitutionalists dared to break the tradition of Japanese politics.

The August Revolution theory has some weak points. The fatal one is its interpretation that the Potsdam Declaration demanded Japan to adopt popular sovereignty. It certainly demanded a democratic government, but it was not at all clear whether this meant to change the fundamental principle of sovereignty. In August 1945, the Japanese government did not think so. It therefore just accepted this recommendation to surrender. Miyazawa himself also did not think so until he was faced with the draft of the government in March 1946. He published an article in October 1945 in which he said that the Meiji Constitution did not need to be amended to meet the demands of the Potsdam Declaration.⁵ The August Revolution theory was based on a fragile interpretation of this declaration, which Miyazawa constructed in hindsight to legitimize the new principles included in the draft of the new Constitution.⁶

After the end of the occupation, the hidden facts about the draft making of the new Constitution were gradually revealed. Most parts of the government draft had been a translation from the English version made by the Allied Powers. The conservatives

⁵ Toshiyoshi Miyazawa, *Kenpo-kaisei ni tsuite* (On Amendments of the Constitution), *Mainichi Shinbun*, Oct.19, 1945, at 1.

⁶ See Ryuichi Nagao, *Nihon Kokka-shisoshi Kenkyu* (Studies on the History of Theories on the State in Japan) 140ff. (1982).

publically declared their antagonism to the “enforced Constitution.” Moreover, the enforcement of the new Constitution on Japan itself was said to exceed the conditions of the Potsdam Declaration. According to the August Revolution theory, Japan needed to accept a new Constitution based on popular sovereignty. The conservatives were nevertheless not persuaded of this theory based on a rather unpersuasive interpretation of the Potsdam Declaration. Constitutional scholars were criticized as they still supported the August Revolution theory to defend the Constitution of Japan, which had truly not been born democratically at all. How to evaluate this theory has been an important dividing line in the continuing debates on the legitimacy of the Constitution of Japan.

IV Evaluating the August Revolution theory

The August Revolution theory has had both positive and negative effects on the disputes regarding the legitimacy of the Constitution of Japan. On the positive side, it has been agreed that the change of the Constitution after the Second World War meant a fundamental conversion of the principle of who has the ultimate sovereign power in Japan. It is now unanimous that Japan has had two Constitutions in its history, although the Constitution of Japan was officially enacted as amendments to the Meiji Constitution. Moreover, the August Revolution theory seems to have played an important role to rigidly restrict the competence of the Tenno by clearly showing the radical change of his position. It definitively drove the sovereignty of the Tenno into the past and emphasized that Japan should maintain a new democratic government.

Nevertheless, it should not be forgotten that the August Revolution theory at first aimed to declare that the government draft of the new Constitution in March 1946 was NOT revolutionary. It said that the plan of the government was legally not problematic because the revolution had already occurred in August 1945. The Japanese could only resign themselves. As mentioned above, however, this interpretation of the Potsdam Declaration is not entirely persuasive. Shortly after the defeat, the future structure of the Japanese government had not yet been determined, as Miyazawa himself had recognized. In fact, the government draft was itself revolutionary. The deliberation on the new Constitution was the process of revolutionary change, and the revolution was accomplished

with the enactment of the Constitution of Japan. The August Revolution theory ridded this process of its revolutionary character.

If such an important scholar as Miyazawa had insisted that the government proposal inherently meant a legally impossible change and asked the Japanese people if they were ready to support it, the legislative process for the new Constitution would have suffered from much more opposition. We might thank his help in concealing its revolutionary character. However, after the enactment of the Constitution, the August Revolution theory was put forth as a legal explanation for its birth. It can be argued that it has worked out to let the Japanese lose the consciousness that they were responsible for this fundamental conversion of the government structure.

It was comical that the conservative groups which had supported the new Constitution in 1946 began to attack it as an “enforced Constitution” after the end of the occupation. Under the occupation, the competency of Japanese government bodies was of course restricted, but that does not exempt them from the responsibility for their behavior at that time. In fact, they forgot their responsibility for producing the Constitution so quickly. It is possible that the August Revolution theory, according to which the basic principles of the coming Japanese government had been determined by the Allied Powers and that the Japanese had not contributed to the revolutionary change, helped this trend.

Therefore, this author agrees with the theory of Koji Sato, a former professor at Kyoto University, that the Meiji Constitution still remained valid after the defeat, but the will of the people to enact the Constitution of Japan based on the revolutionary new principle of popular sovereignty was clarified during the deliberations. The legitimacy of the Constitution of Japan should be sought in this sovereign will of the people.⁷

Finally, it is doubtful whether Miyazawa continued to assert that the August Revolution theory legitimized the Constitution of Japan. In 1957, he wrote an article about the legitimacy of constitutions to refute the conservative insistence that the Constitution of Japan should be seen as invalid because it revolutionarily denied the sovereignty of the Tenno. Miyazawa did not resort to the August Revolution theory there, however. He denied the idea that the legitimacy of constitutions could be sought in how they are born. He said

⁷ Koji Sato, *Nihonkoku-kenpo-ron* (On the Constitution of Japan) 68 (2011).

that constitutions are legitimate if they guarantee freedom and minimum standards of existence for everyone. He recognized that his assertion was the same as Gustav Radbruch's natural law theory after the Second World War.⁸

It is not clear if and how this assertion is compatible with the August Revolution theory. One can imagine that Miyazawa saw that the latter thesis, which was originally insisted upon to legitimize the draft of the new Constitution, had already lost its significance. To defend the Constitution, which began to be established in Japanese society, it might be better to directly evaluate its contents.

However, the conservatives are discontent anyway with the very contents of the Constitution of Japan, especially the broad guarantees of human rights and pacifism, and believe that they are included in the Japanese Constitution just because it was enforced by the Allied Powers. In the discussions in Japan, the birth and the contents of the Constitution of Japan are problems that are tied together inseparably. The conservatives have never averted their eyes from the defect today's Constitution had at its birth. The legitimacy of the Constitution of Japan is still disputed today. Because the August Revolution theory has been the most famous and popular explanation to defend it, we cannot escape from 1946, when the "new" Constitution was enacted.

⁸ Toshiyoshi Miyazawa, *Kenpo no Genri* (Principles of Constitutional Law) 401ff. (1967, first published in 1957).